

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 29, 2009 Session

STATE OF TENNESSEE v. JENNY LYNN SILER

**Appeal from the Criminal Court for Campbell County
No. 12650 E. Shayne Sexton, Judge**

No. E2008-00958-CCA-R3-CD - Filed December 23, 2009

The Defendant, Jenny Lynn Siler, appeals as of right from the Campbell County Criminal Court's denial of judicial diversion and alternative sentencing following her guilty pleas to four counts of sale of oxycodone, Class C felonies. Pursuant to the plea agreement, the trial court imposed four concurrent eight-year sentences with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court imposed a sentence of split confinement, with four months to be served in the Campbell County Jail followed by the balance to be served on community corrections. On appeal, the Defendant contends that the trial court erred by denying her motion to recuse or change venue for sentencing, by denying her application for judicial diversion, and, alternatively, by denying her full probation. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Herbert S. Moncier and Adam S. Moncier (at trial and on appeal), Knoxville, Tennessee; and Kristie N. Anderson (at trial), Jacksboro, Tennessee, attorneys for appellant, Jenny Lynn Siler.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William Paul Phillips, District Attorney General; and Michael O. Ripley, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

In October 2005, the Campbell County grand jury indicted the Defendant for four counts of sale of oxycodone in a drug-free school zone, Class B felonies. On July 10, 2006, the Defendant filed a waiver of jury trial and request for acceptance of guilty plea indicating that the Defendant would enter pleas to four counts of sale of oxycodone, Class C felonies, with an agreed sentence of eight years as a Range I, standard offender. On September 21, 2006, the trial court filed a Judgment Pending Probation/Community Corrections Hearing reflecting that the Defendant pled guilty but

reserving consideration of probation and community corrections pending the preparation of the presentence investigation report. A presentence investigation report was filed on October 2, 2006 and amended on February 22, 2008. On March 19, 2008, the Defendant filed an application for sentencing pursuant to Tennessee Code Annotated section 40-35-313, otherwise known as judicial diversion.

On March 24, 2008, the trial court held a sentencing hearing to determine the manner of service of the Defendant's sentence. That same day, the Defendant filed a motion for change of venue which was denied by the trial court. The Defendant testified at the sentencing hearing that she committed the offenses when asked to by her husband, who already had pending charges. She explained that since her arrest in 2006, she had been unable to obtain employment and to maintain housing and that she had no source of income. The Defendant attributed these difficulties to community prejudice caused by her involvement in the federal civil rights litigation stemming from her husband's torture at the hands of five Campbell County Sheriff's deputies who had since been convicted in federal court. Although the Defendant claimed to have not received any money from the sale of the prescription pills, she also testified that she sold the pills because she "had to pay bills." She testified that she was trying to care for her eleven-year-old son and asked the trial court to grant her request for judicial diversion. One of the Defendant's attorneys also testified that the Defendant had done everything asked of her throughout the pendency of the case and urged the trial court to grant the Defendant's judicial diversion request. The State objected to any consideration of the judicial diversion request and argued that it was not contemplated as part of the plea agreement. Notably, the transcript of the plea submission hearing is absent from the record on appeal.

Following the arguments of counsel, the trial court ruled that the Defendant was precluded from requesting judicial diversion because judicial diversion was never contemplated as part of the plea agreement. Concerning the manner of service of the sentence, the trial court took the matter under advisement and issued a written ruling the following day. The trial court advised the parties that the written ruling arose from a concern that the issue of sentencing "be looked at in its entirety" so that the trial court could make sure that the Defendant was being treated "consistently, in such a way that other defendants have been treated in the past" given the Defendant's claim that she had been victimized due to her involvement in the federal civil rights litigation. On March 25, 2008, the trial court filed an order denying full probation to the Defendant, but imposing sentences of split confinement requiring the service of four months in the Campbell County Jail followed by the satisfaction of the remaining sentence on community corrections.

ANALYSIS

Recusal and Change of Venue

At the February 25, 2008 hearing, the parties brought to the attention of the trial court a petition that certain citizens of Campbell County had circulated urging "the District Attorney, the courts, the Sheriff and everybody involved to put drug dealers away in prison as opposed to alternative sentencing." Defendant's counsel noted concerns regarding her pending sentencing

hearing given that the petition specifically referred to the Defendant and her pending charges. The State informed the court that it would not rely upon any of the information contained in the petition, characterizing it as “an expression of the opinions of whoever has signed the petition . . . but . . . it’s not a piece of evidence of anything that the Court can really consider in rendering a sentence in this case.” The State reiterated its position regarding the petition, stating that “[i]t’s not something the Court could use in fashioning a sentence in this case, and the State would not suggest that the Court could use it.”

Throughout the discussion of the petition, the trial judge stated his commitment to follow the sentencing law and indicated his impartiality regarding public opinion. In one instance, the trial judge told the parties that “this Court has no intention of politicizing sentencing or doing anything but what the law provides.” The trial judge stated that the petition

would render any sentence given by this Court subject to reversal if I considered one part of this. So I want to make that clear for the record and for anyone interested in that side of this, that it is improper, there is no part in the law that will allow that, and this Court and everyone in it is a creature of that law. It’s not something that we make up. So, we are bound by the legislature’s mandates concerning sentencing. And if there is any complaint about that, it can be taken up with them. But, I’m gonna follow the law as I know it and as I am told to do it.

. . . .

[T]his court does not have the luxury of taking a poll in deciding what ought to happen, and I’m not gonna do it, I’ve never done it, and I won’t start now. We’re gonna sentence this case as it should be. Whatever I give will be what I think the law provides in this case, and it is subject to review by our appellate courts. But, this Court cannot and will not deal with this case through a petition.

The trial judge noted on the record that it did not review the petition. Additionally, the transcript reflects that the trial judge ordered the petition to be placed under seal in the record for later review if necessary.¹

At the conclusion of the discussion of the petition, the trial judge reset the sentencing hearing for March 24, 2008. At the March 24 hearing, the Defendant asserted that the trial judge should recuse himself or grant the motion for change of venue, citing concerns regarding the community’s hostile attitude toward the Defendant. The trial judge denied both motions, stating that the issue of the petition had been dealt with and that the Defendant “can be given a fair shake in sentencing in this Court.” The trial judge proceeded with the sentencing hearing and imposed the sentences as previously discussed. Following the entry of the judgments, the Defendant filed a motion for

¹ We note, as did the State, that the sealed petition was not made part of the appeal to this court. However, because the trial judge explicitly stated that he did not consider or even review the petition, the failure to include it in the record on appeal is of no consequence to our ruling.

reconsideration of the sentences and renewed motions for recusal and change of venue; the trial judge denied these motions by written order.

The Defendant argues that “[a]ttempts to influence the Trial Judge and community prejudice against [the Defendant] were sufficient that the Trial Judge’s impartiality ‘might be reasonably questioned’ and that a fair sentencing hearing could not take place in Campbell County.” The State contends that the record establishes that the trial court did not abuse its discretion by denying both motions. Furthermore, the State notes that our rules of criminal procedure do not contemplate a change of venue for sentencing.

The decision to grant a motion for recusal lies solely within the trial court’s discretion. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). This Court may reverse the trial judge’s decision only when the judge has clearly abused that discretionary authority. State v. Cash, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993). A judge should recuse himself or herself whenever the judge’s “‘impartiality [could] reasonably be questioned.’” Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994) (quoting Code of Judicial Conduct, Canon 3(c) (now part of Tenn. Sup. Ct. R. 10, Canon 3(E)(1))). Furthermore, recusal is appropriate “when a person of ordinary prudence in the judge’s position . . . would find a reasonable basis for questioning the judge’s impartiality.” Id. (footnote omitted). Therefore, any trial judge addressing a motion for recusal must determine whether he or she has a subjective bias against the defendant and whether the trial judge’s impartiality could reasonably be questioned under an objective standard. State v. Connors, 995 S.W.2d 146, 148 (Tenn. Crim. App. 1998).

As previously discussed, the trial judge in this case went to great lengths to avoid any reasonable basis upon which his impartiality might be questioned. After refusing to review the citizen petition and ordering the petition to be filed under seal, the trial judge stressed that public sentiment would not play any role in his decision-making. The trial judge stated on the record that he could be fair and impartial and that he would follow only appropriate sentencing considerations in his determination; his statements are indicators that he lacked any subjective bias against the defendant. Furthermore, his decision not to review the petition and to place it under seal further show that his impartiality cannot be questioned under even an objective standard. Therefore, we conclude that there is no abuse of discretion apparent on this record.

Relative to the Defendant’s allegation that the trial court should have granted the motion for change of venue, Rule 21(a) of the Tennessee Rules of Criminal Procedure provides for a change of venue “when a fair *trial* is unlikely because of undue excitement against the defendant.” (emphasis added). Our procedural rules clearly do not contemplate a change of venue for a sentencing hearing – the outcome of which, in all cases except those in which a jury determines the punishment of the death penalty or life without the possibility of parole, will be determined by a trial judge and not a jury. Thus, the appropriate manner in seeking redress regarding a fair *sentencing hearing* is through a motion to recuse the trial judge. We agree with the State that there is no procedural basis for changing venue at the sentencing stage of this proceeding. Accordingly, the trial court correctly denied the motion for change of venue.

Judicial Diversion

Next, the Defendant argues that the trial court erred in denying her request for judicial diversion. She contends that the trial court erroneously found that consideration of judicial diversion was precluded by the plea agreement. The State contends that the trial court properly denied judicial diversion because it was not contemplated by the plea agreement and the Defendant's guilt had already been adjudicated with the entry of the plea agreement two years prior to the Defendant's application for judicial diversion, thereby precluding the trial court's consideration of judicial diversion.

Tennessee Code Annotated section 40-35-313 provides that, following a determination of guilt by plea or by trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A) (2006). A qualified defendant is one who is found guilty or pleads guilty or nolo contendere to a misdemeanor or Class C, D, or E felony; has not been previously convicted of a felony or a Class A misdemeanor; and who is not seeking deferral for a sexual offense, a violation of Tennessee Code Annotated sections 71-6-117 or 71-6-119, or a Class A or B felony. *Id.* § 40-35-313(a)(1)(B)(I). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against her, and the defendant may have the records of the proceedings expunged. *Id.* § 40-35-313(a)(2), (b). At sentencing, the State conceded that the Defendant qualified for judicial diversion based upon her convictions for Class C felonies and absence of a prior record. However, the prosecutor argued that because he never agreed that judicial diversion would be considered under the terms of the plea agreement, the trial court was precluded from considering the Defendant's request. In fact, the prosecutor commented that he "had not expected to see [the judicial diversion request]. . . . [because] it was not in contemplation of the parties." At the sentencing hearing, defense counsel² acknowledged that the State "was not agreeable" to judicial diversion during their plea negotiations, but she contended that the Defendant never waived in writing its consideration.

At trial and before this court, the State relies upon our supreme court's holding in State v. Soller, 181 S.W.3d 645 (Tenn. 2005), in support of its argument that the trial court was precluded from considering the Defendant's application for judicial diversion. The State contends that the terms of the plea agreement did not include such consideration and that the entry of the interim judgment constituted an adjudication of guilt foreclosing any consideration of judicial diversion. In Soller, the Defendant entered into a negotiated plea agreement with the State whereby he pled guilty to aggravated burglary, aggravated assault, and resisting arrest in exchange for a six-year sentence suspended to community corrections after the service of thirty days in jail. On the day of the submission hearing, Soller requested judicial diversion. The State objected because the consideration of judicial diversion was not part of the plea agreement. The trial court accepted Soller's plea and entered judgments reflecting the sentence as negotiated by the plea agreement. After the entry of the judgments, Soller filed a motion for correction of judgments. Following a

² We note that original defense counsel conceded these points because she participated in the guilty plea. Additional counsel became involved in the case some time after the guilty plea submission; and, as previously explained, filed the request for judicial diversion eighteen months after the guilty pleas were entered.

hearing, the trial court again denied Sollers's request for judicial diversion, finding that he was statutorily ineligible for judicial diversion because he had been granted diversion previously in another jurisdiction. This court concluded that his prior diversions would not render him ineligible, but it affirmed the judgment of the trial court concluding that "the trial court was without authority to grant diversion because it could not alter the terms of the plea agreement." Soller, 181 S.W.3d at 647. On appeal, our supreme court affirmed the judgment of this court and concluded that:

when a trial court accepts a plea agreement pursuant to Tennessee Rule of Criminal Procedure 11(e)(1)(C), such agreement represents the full and complete agreement between the parties and cannot be altered by the trial court to include judicial diversion. Thus, the trial court may entertain the issue of judicial diversion only when the court rejects the agreement or when such an option is reflected in the 11(e)(1)(C) plea agreement. Additionally, once a judgment of guilty has been entered, the trial court is precluded from granting judicial diversion.

Id. at 650 (discussing Rule 11(e)(1)(C) now codified at Rule 11(c)(1)(C), Tenn. R. Crim. P.).

In similar fashion, the trial court in this case ruled that it could not alter the terms of a plea agreement that did not contemplate the consideration of judicial diversion. At the sentencing hearing, the State argued that judicial diversion was not a contemplated element of the plea agreement. The Defendant conceded that the State had opposed judicial diversion during plea negotiations. As previously noted, the transcript of the guilty plea submission is absent from this record. All of the pleadings related to the guilty plea are silent regarding the consideration of judicial diversion. Contrary to the Defendant's argument, judicial diversion was not reserved by the pleadings as a form of alternative sentencing because it is not a form of alternative sentencing. See, e.g., State v. Faith Renea Irwin Gibson, No. E2007-01990-CCA-R3-CD, 2009 WL 1034770, at *4 (Tenn. Crim. App. Apr. 17, 2009). Based upon the record before this court, there is no indication that the Defendant intended to reserve consideration of judicial diversion. Accordingly, we must presume that the trial court's ruling is correct. The Defendant's argument is without merit.

Probation

Alternatively, the Defendant argues that the trial court should have granted her full probation. The State argues that the trial court correctly denied full probation based upon the need for deterrence in the community and the Defendant's lack of potential for rehabilitation.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The principles of sentencing reflect that a defendant's sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Our sentencing act also provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Id. § 40-35-102(6); see State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" for purposes of the statute:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1); see State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000). In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-103.

The Defendant was convicted of four Class C felonies as a Range I, standard offender. Thus, she was eligible for alternative sentencing. However, a defendant has the burden of establishing his or her suitability for full probation, even if the defendant is entitled to be considered a favorable candidate for alternative sentencing. See State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). No criminal defendant is automatically entitled to probation as a matter of law. State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would "subserve the ends of justice and the best interests of both the public and the defendant." State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (citations omitted). Furthermore, under Tennessee's revised sentencing act, the provision that certain defendants should be considered favorable candidates for alternative sentencing is an "advisory sentencing guideline" that the trial court "shall consider, but is not bound by...." Tenn. Code Ann. § 40-35-102(6).

The record reveals that the trial court gave consideration to each factor in arriving at its decision to deny the Defendant's request for full probation and in requiring a sentence of split confinement consisting of the service of four months in the county jail followed by the balance of the sentences served on community corrections. The trial court acknowledged that the Defendant

possessed no history of prior convictions but expressed great concern that the Defendant committed the offenses after her husband had been placed on probation for similar offenses. The trial court noted that such actions reflected poorly upon the Defendant's potential for rehabilitation and favored a sentence of some period of incarceration. We conclude that the record supports the trial court's decision regarding alternative sentencing. Accordingly, the judgments of the trial court are affirmed.

CONCLUSION

In consideration of the foregoing, we conclude that the trial court did not abuse its discretion in denying the Defendant's motion to recuse and that there was no basis for a motion for change of venue. The trial court correctly denied judicial diversion because it was not contemplated between the parties to be part of the plea agreement. Additionally, the trial court did not err in denying full probation. Accordingly, the judgments of the trial court are affirmed in all respects.

D. KELLY THOMAS, JR., JUDGE